

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11 SEAN E. BRAZIL,) Civil No. 07cv0082 L(RBB)
12 Petitioner,)
13 v.) **REPORT AND RECOMMENDATION RE:**
14 BEN CURRY, Warden, et al.,) **GRANTING MOTION TO DISMISS**
15) **PETITION FOR WRIT OF HABEAS**
16 Respondents.) **CORPUS [DOC. NO. 9]**

17 Sean E. Brazil, a state prisoner proceeding pro se, filed
18 a Petition for Writ of Habeas Corpus in this Court on January 11,
19 2007 [doc. no. 1]. On January 22, 2007, the Court dismissed the
20 Petition without prejudice due to Petitioner's failure to name a
21 proper respondent. (Order Dismissing Case [doc. no. 2].) Brazil
22 was instructed to file a First Amended Petition by March 26, 2007.
23 (Id.) He filed the pending First Amended Petition [doc. no. 4] on
24 February 5, 2007.

25 Petitioner alleges nine grounds for relief: (1) He was denied
26 effective assistance of counsel because his attorney failed to
27 timely obtain affidavits from jurors regarding their misconduct;
28 (2) Petitioner was denied effective assistance of counsel because

1 his appellate counsel failed to have an investigator interview the
 2 jurors, as promised; (3) he was denied due process of law when he
 3 was convicted on insufficient evidence; (4) Petitioner was denied
 4 due process because the prosecutor improperly "vouched" for her
 5 witness; (5) he was denied due process of law because the
 6 prosecution utilized an "illegal" jury instruction; (6) Petitioner
 7 was denied due process because the prosecution shifted the burden
 8 of proof to Brazil; (7) he was denied due process of law because
 9 the jury based their verdicts on false and extraneous information;
 10 (8) Petitioner was denied due process because the prosecutor
 11 withheld exculpatory evidence; and (9) he was denied due process of
 12 the law because the trial court imposed an unduly harsh sentence.
 13 (Am. Pet. 6-14.)

14 On May 17, 2007, Respondent Ben Curry filed a Motion to
 15 Dismiss [doc. no. 6] and a Memorandum of Points and Authorities in
 16 Support of Motion. Respondent argues that Brazil's First Amended
 17 Petition is time-barred by the Antiterrorism and Effective Death
 18 Penalty Act's (AEDPA's) statute of limitations. (Resp't's Mem. P.
 19 & A. 7.) Brazil submitted his Opposition to and Motion to Deny
 20 Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus
 21 [doc. no. 8] and a Memorandum of Points and Authorities in Support
 22 of his Opposition, which was filed nunc pro tunc to June 11, 2007.

23 This Court has reviewed the First Amended Petition and
 24 supporting brief, Respondent's Motion and Memorandum in Support of
 25 the Motion, Petitioner's Opposition to Respondent's Motion and
 26 Memorandum in Support of the Opposition, and the lodgments. For
 27 the reasons expressed below, the Court recommends that Respondent's
 28 Motion to Dismiss be **GRANTED**.

I. FACTUAL BACKGROUND

2 On April 17, 1998, Brazil and a friend met two girls, ages
3 fourteen and fifteen, at a shopping mall.¹ (Resp't's Mem. P. & A.
4 4.) Petitioner bought alcohol and the four of them drove around
5 drinking. (*Id.*) The fifteen-year-old girl "felt drunk" and was
6 unable to walk straight. (*Id.*) They went to a hotel where
7 Petitioner had sexual intercourse with the fifteen-year-old until
8 she made him stop. She left the room crying; her friend left with
9 her. (*Id.*) The two girls found their youth pastor across the
10 street and told him what happened. (*Id.*) He called the police,
11 who came to investigate. (*Id.*) The officers discovered a condom
12 wrapper in one of the two beds in the hotel room. (*Id.*)

13 Three months later, during the afternoon of July 17, 1998,
14 Brazil called the mother of his children, Rebecca, who was staying
15 at his mother's house with the children. (Lodgment 1, People v.
16 Brazil, Case No. D033218, slip op. 2.) Brazil demanded the
17 telephone number of a man she was seeing. (Id.) Rebecca refused.
18 (Id.) Petitioner called again at midnight demanding the same
19 number and asserting that he would bring a gun to the house and
20 force the number out of her. (Id.) At approximately 1:50 a.m.,
21 Rebecca awoke to Brazil pointing a gun at her, again demanding the
22 telephone number. (Id.) When she refused to give him the number

24 ¹ The California Court of Appeal did not discuss the facts
25 relating to Brazil's conviction for unlawful sexual intercourse or
26 lewd conduct with a fourteen- or fifteen-year-old because he did
not challenge those convictions. (Lodgment No. 1, People v.
27 Brazil, Case No. D033218, slip op. 2 n.2 (Cal. Ct. App. Dec. 16,
28 1999).) Here, Respondent argues that Brazil's Petition is barred
by the statute of limitations. (Resp't's Mem. P. & A. 7.) For
that reason, this Court refers to Respondent's brief for the
factual history for these two convictions as general background for
the habeas Petition.

1 he stated, "'[G]ive me the phone number or I'll blow you and your
 2 kids away.'" (*Id.*) Brazil's mother told him to leave; he
 3 struggled with his mother over the gun; and he left after Rebecca
 4 gave him a telephone number. (*Id.* at 2-3.)

5 II. PROCEDURAL BACKGROUND

6 On August 14, 1998, the San Diego County District Attorney
 7 filed a five-count information charging Petitioner with assault
 8 with a firearm, see Cal. Penal Code § 244(a)(2), residential
 9 burglary, see Cal. Penal Code § 459, making a terrorist threat, see
 10 Cal. Penal Code § 422, unlawful sexual intercourse with a minor
 11 under the age of sixteen, see Cal. Penal Code § 261.5(d), and
 12 committing a lewd act on a child fourteen or fifteen years of age,
 13 see Cal. Penal Code § 288(c)(1). (Resp't's Mem. P. & A. 1-2.) The
 14 information also alleged that Brazil had previously been convicted
 15 of a serious felony, see Cal. Penal Code § 661(a)(1), and that he
 16 had been previously convicted of a "strike" offense, see Cal. Penal
 17 Code §§ 667(b)-(i). Finally, the information alleged that Brazil
 18 personally used a firearm in the commission of counts one through
 19 three, see Cal. Penal Code §§ 1192(c)(8), 12022(a)(1). (Resp't's
 20 Mem. P. & A. 1-2.)

21 On January 25, 1999, a jury convicted Petitioner of all counts
 22 charged, finding that both the firearm allegation and the prior
 23 "strike" allegation were true. (*Id.* at 2.) On March 24, 1999,
 24 Brazil was sentenced to sixteen years in state prison. (*Id.*)
 25 Petitioner received four years for the residential burglary, which
 26 was doubled based on the prior "strike" conviction. Additionally,
 27 he received two years for the sex offense, a five-year enhancement
 28 for the serious felony prior, and one additional year for the

1 personal use of a firearm. (Lodgment 1, People v. Brazil, Case No.
 2 SCD138587, slip op. 3.)

3 Petitioner appealed the conviction, asserting that the trial
 4 court erred in admitting evidence regarding the amount of financial
 5 support Petitioner provided for his children. (Id. at 3.) His
 6 conviction was affirmed by the court of appeal on December 16,
 7 1999. (Id. at 4.) Brazil filed a petition for rehearing of the
 8 decision which was denied on January 7, 2000. (Pet'r's Opp'n Mem.
 9 P. & A. Ex. A.) He did not file a petition for review with the
 10 California Supreme Court. (Resp't's Mem. P. & A. 6.)

11 Brazil, acting pro se, filed his first habeas corpus petition
 12 on December 21, 2000, with the San Diego Superior Court.

13 (Lodgment 2 Attach., In re Brazil, No. HC16533, Pet. 3-14 (Cal.
 14 Super. Ct. Jan. 18, 2001).) His petition was denied on January 18,
 15 2001. (Lodgment 2, In re Brazil, No. HC16533, Order 4 (Cal. Super.
 16 Ct. Jan 18, 2001).) On September 20, 2001, he filed a habeas
 17 corpus petition with the California Court of Appeal. (Lodgment 3
 18 Attach., In re Brazil, No. D038775, Pet. 3-10 (Cal. Ct. App. Nov.
 19 28, 2001).) The court denied the petition on November 28, 2001.
 20 (Lodgment 3, In re Brazil, No. D038775, slip op. 2 (Cal. Ct. App.
 21 Nov. 28, 2001).) Almost a year later, on November 18, 2002, Brazil

22 filed a second habeas corpus petition in the superior court
 23 alleging miscalculation of his post-sentence credits, an issue not
 24 raised in his previous petitions. (Lodgment 4, In re Brazil, No.
 25 HC16533 Order Denying Second Pet. 1-3 (Cal. Super. Ct. Dec. 5,
 26 2002).) The petition was denied December 5, 2002. (Id.) Brazil
 27 then filed a habeas corpus petition with the California Supreme
 28 Court on June 30, 2005. (Lodgment 5 Attach., In re Brazil, No.

1 S134859, Pet. 1 (Cal. May 24, 2006).) The petition was summarily
 2 denied on May 24, 2006. (Lodgment 5, In re Brazil, No. S134859,
 3 Order 1 (Cal. May 24, 2006).)

4 On January 11, 2007, Brazil filed his first federal Petition
 5 for Writ of Habeas Corpus in this Court [doc. no. 1]. The Court
 6 dismissed the Petition without prejudice for Petitioner's failure
 7 to name a proper respondent. (Order Dismissing Case 1.)
 8 Petitioner timely filed the pending First Amended Petition [doc.
 9 no. 4] on February 5, 2007. In his Amended Petition, Petitioner
 10 properly names a respondent and alleges nine grounds for relief.
 11 (Pet. 1, 6-14.)

12 Respondent filed a Motion to Dismiss on May 17, 2007, claiming
 13 that the Petition is time-barred under AEDPA's statute of
 14 limitations. (Resp't's Mem. P. & A. 7.)

15 III. STANDARD OF REVIEW

16 Because Brazil filed his Petition after April 24, 1996, it is
 17 subject to the Antiterrorism and Effective Death Penalty Act
 18 (AEDPA) of 1996. 28 U.S.C.A. § 2244 (West 2006). AEDPA sets forth
 19 the scope of review for federal habeas corpus claims:

20 The Supreme Court, a Justice thereof, a circuit
 21 judge, or a district court shall entertain an application
 22 for a writ of habeas corpus in behalf of a person in
 23 custody pursuant to the judgment of a State court only on
 24 the ground that he is in custody in violation of the
 25 Constitution or laws or treaties of the United States.

26 28 U.S.C.A. § 2254(a) (West 2006); see also Hernandez v. Ylst, 930
 27 F.2d 714, 719 (9th Cir. 1991).

28 To present a cognizable federal habeas corpus claim, a state
 29 prisoner must allege that his conviction was obtained "in violation
 30 of the Constitution or laws or treaties of the United States." 28

1 U.S.C. § 2254(a). A petitioner must allege that the state court
 2 violated his federal constitutional rights. Hernandez, 930 F.2d at
 3 719; Jackson v. Ylst, 921 F.2d 882, 885 (9th Cir. 1990); Mannhalt
 4 v. Reed, 847 F.2d 576, 579 (9th Cir. 1988).

5 In 1996, Congress "worked substantial changes to the law of
 6 habeas corpus." Moore v. Calderon, 108 F.3d 261, 263 (9th Cir.
 7 1997). Amended § 2254(d) now reads:

8 An application for a writ of habeas corpus on behalf
 9 of a person in custody pursuant to the judgment of a
 State court shall not be granted with respect to any
 10 claim that was adjudicated on the merits in State court
 proceedings unless the adjudication of the claim --

11 (1) resulted in a decision that was
 12 contrary to, or involved an unreasonable
 application of, clearly established Federal
 13 law, as determined by the Supreme Court of the
 United States; or

14 (2) resulted in a decision that was based
 15 on an unreasonable determination of the facts
 in light of the evidence presented in the State
 16 court proceeding.

17 28 U.S.C.A. § 2254(d) (West 2006).

18 IV. DISCUSSION

19 The statute of limitations for habeas corpus petitions is set
 20 forth in AEDPA. As amended by AEDPA, 28 U.S.C. § 2244(d) provides:

21 (1) A 1-year period of limitation shall apply to an
 22 application for a writ of habeas corpus by a person in
 custody pursuant to the judgment of a State court. The
 23 limitation period shall run from the latest of --

24 (A) the date on which the judgment became
 25 final by the conclusion of direct review or the
 expiration of the time for seeking such review;

26 (B) the date on which the impediment to filing
 27 an application created by State action in violation
 of the Constitution or laws of the United States is
 removed, if the applicant was prevented from filing
 by such State action;

28 (C) the date on which the constitutional
 right asserted was initially recognized by the

Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

6 28 U.S.C.A. § 2244(d)(1) (West Supp. 2007). Petitioner has not
7 asserted that subsections (B)-(D) of § 2244(d)(1) apply to his
8 case, so § 2244(d)(1)(A) provides the applicable date on which the
9 limitations period began to run.

The California Court of Appeal affirmed Brazil's conviction on December 16, 1999. (Lodgment 1, People v. Brazil, No. SCD138581, slip op. 3.) The appellate court denied Petitioner's petition for rehearing on January 7, 2000. (Pet'r's Opp'n Mem. P. & A. Ex. A.) Brazil did not file a petition for review with the California Supreme Court. For purposes of AEDPA, the time for direct review includes the period during which the petitioner could have sought direct review from the California Supreme Court. See 28 U.S.C. § 2244(d)(1)(A); Smith v. Duncan, 297 F.3d 809, 813 (9th Cir. 2002).

Petitioner's judgment therefore became final forty days after the California Court of Appeal denied his petition for rehearing. See People v. Jackson, 67 Cal. 2d 96, 98, 429 P.2d 600, 602, 60 Cal. Rptr. 248, 250 (1967) (stating the petitioner's "availability of appeal" was exhausted when his petition for rehearing was denied); Duncan, 297 F.3d at 813; see also Cal. R. Ct. 8.264 (formerly Rule 24); Cal. R. Ct. 8.500(e) (formerly Rule 28). The statute of limitations for Petitioner's federal habeas corpus claim began to run on February 17, 2000, and, absent statutory or equitable tolling, would have expired on February 16, 2001. See

1 Patterson v. Stewart, 251 F.3d 1243, 1245-46 (9th Cir. 2001)
 2 (quoting Fed. R. Civ. Pro. 6(a)) ("In computing any amount of time
 3 prescribed or allowed . . . by any applicable statute, the day of
 4 the act, event, or default from which the designated period of time
 5 runs shall not be included.").

6 Petitioner filed his federal Petition on January 11, 2007,
 7 nearly seven years after his conviction became final. Brazil's
 8 Amended Petition, filed on February 5, 2007, relates back to the
 9 filing of his original Petition, because the amended pleading
 10 asserts the same grounds for relief. See Fed. R. Civ. P. 15(c); 28
 11 U.S.C.A. § 2242 (West 2006). Nevertheless, unless Petitioner is
 12 entitled to sufficient statutory or equitable tolling, this action
 13 is barred by AEDPA's statute of limitations.

14 **1. Statutory Tolling**

15 Under AEDPA, the statute of limitations is tolled during
 16 periods when a petitioner has a properly filed application for
 17 collateral review pending in state court. Specifically, 28 U.S.C.
 18 § 2244(d)(2) states:

19 The time during which a properly filed application
 20 for State post-conviction or other collateral review with
 21 respect to the pertinent judgment or claim is pending
 shall not be counted toward any period of limitation
 under this subsection.

22 28 U.S.C. § 2244(d)(2) (West Supp. 2007).

23 Additionally, the interval between the disposition of one
 24 state petition and the filing of another may be tolled under
 25 "interval tolling." Carey v. Saffold, 536 U.S. 214, 223 (2002).
 26 For purposes of interval tolling, an application for state
 27 collateral review is pending "as long as the ordinary state
 28 collateral review process is 'in continuance'. . . . In other

1 words, until the application has achieved final resolution through
 2 the State's post-conviction procedures, by definition it remains
 3 'pending.'" Carey, 536 U.S. at 219-20.

4 Respondent concedes that interval tolling applies to several
 5 of the time delays in this case because Petitioner was properly
 6 pursuing his state remedies. (Resp't's Mem. P. & A. 6-7); see also
 7 Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). Respondent
 8 asserts, however, that interval tolling should not apply to delays
 9 between lower court decisions and the filing of new petitions in a
 10 higher court that were "unreasonable" under California law.
 11 (Resp't's Mem. P. & A. 6-7); see also Evans v. Chavis, 546 U.S.
 12 189, 198 (2006) (stating that "the federal court must decide
 13 whether the filing of the request for appellate review in state
 14 collateral review proceedings was made within what California would
 15 consider a 'reasonable time[]'").

16 The statute of limitations on Petitioner's federal habeas
 17 corpus claim began running on February 17, 2000. Brazil filed his
 18 first petition in the San Diego Superior Court on December 21,
 19 2000, after 309 days of the statute of limitations had run. This
 20 309 day period is not tolled. See Nino, 183 F.3d at 1006 (stating
 21 that AEDPA's limitations period is not tolled before the first
 22 state collateral challenge is filed). Statutory tolling began on
 23 December 21, 2000, because Brazil's state habeas corpus petition
 24 was a "properly filed application for . . . state collateral
 25 review." 28 U.S.C. § 2244(d)(2). It is uncontested that under
 26 "interval tolling" the statute of limitations was tolled through
 27 November 28, 2001, when the California Court of Appeal denied
 28

1 Brazil's habeas petition. (Resp't's Mem. P. & A. 6); see also
2 Carey, 536 U.S. at 219-21.

3 Petitioner subsequently wrote a letter to his sentencing judge
4 and explained that he believed his sentencing credits were
5 miscalculated. (Lodgment 4 Attach., In re Brazil, No. HC16533,
6 Pet. 2.) The court construed this letter to be a second habeas
7 corpus petition, and it was filed on November 18, 2002. (Lodgment
8 4, In re Brazil, No. HC16533 Order Denying Second Pet. 2.) The
9 letter contested the calculation of Brazil's post-sentence credits.
10 (Id.) This allegation was not contained in any prior or subsequent
11 petitions. Respondent asserts that the 355 days between the filing
12 of the court of appeal decision on November 28, 2001, and the
13 filing of Brazil's second superior court petition on November 18,
14 2002, constitutes an unreasonable delay and, therefore, this time
15 is not subject to statutory tolling. (Resp't's Mem. P. & A. 6-7
16 (citing Gaston v. Palmer, 447 F.3d 1165, 1167 (9th Cir. 2006))).
17 The warden also argues that the delay of two years, six months and
18 fifteen days between the denial of the second petition on December
19 5, 2002, and the filing of a petition with the California Supreme
20 Court on June 20, 2005, is another unreasonable delay that does not
21 toll the statute of limitations. (Id. at 7.)

22 Brazil's second superior court petition alleged a claim
23 unrelated to the claims asserted in his other state petitions or
24 his federal habeas petition. (See Lodgment 4, In re Brazil, No.
25 HC16533, Order Denying Second Pet. 2.) Therefore, the statute of
26 limitations is not tolled for the time period this second petition
27 was pending. See Gaston, 447 F.3d at 1166 (disregarding Gaston's
28 third habeas corpus petition for purposes of statutory tolling

1 because it asserted claims unrelated to those pending in his
 2 federal petition); Welch v. Carey, 350 F.3d 1079, 1082-83 (9th Cir.
 3 2003) (stating that a state habeas petition asserting different
 4 claims from a previous petition begins a new "round" of collateral
 5 review for tolling purposes).

6 The delay between the California Court of Appeal's denial on
 7 November 28, 2001, and the filing of Brazil's habeas corpus
 8 petition with the Supreme Court of California on June 30, 2005, was
 9 four years, five months and two days. (See Lodgment 3, In re
 10 Brazil, No. D038775, slip op. 1; Lodgment 5 Attach., In re Brazil,
 11 No. S134859, Pet. 1.) In order for a petition to be "properly
 12 filed" for purposes of tolling the statute of limitations, the
 13 petition must have been timely filed. Pace v. DiGuglielmo, 544
 14 U.S. 408, 410 (2005). A petition is timely filed under California
 15 law if it is filed within a "reasonable time." See Evans, 546 U.S.
 16 at 192 (quoting In re Harris, 5 Cal. 4th 813, 828 n.7, 855 P.2d
 17 391, 398 n.7, 21 Cal. Rptr. 2d 373, 380 n.7 (1993)). When the
 18 California Supreme Court denied Petitioner's writ of habeas corpus,
 19 it did not indicate whether the petition had been timely filed.
 20 (Lodgment 5, In re Brazil, No. S134859, Order 1.) Accordingly,
 21 this Court must determine whether that state supreme court would
 22 have found Brazil's petition timely filed.

23 The Supreme Court of the State of California would not
 24 conclude that a delay of nearly four and a half years was
 25 reasonable and would not find Brazil's petition timely. See Carey,
 26 536 U.S. at 219 (stating that the reasonableness determination
 27 should be considered in light of the fact that most states allow
 28 approximately thirty to sixty days "for filing an appeal to the

1 state supreme court"); Evans, 546 U.S. at 201 (holding that an
 2 unexplained delay of six months was unreasonable); Gaston, 447 F.3d
 3 at 1167 (holding unexplained delays of fifteen, eighteen, and ten
 4 months unreasonable); Culver v. Dir. of Corr., 450 F. Supp. 2d
 5 1135, 1140-41 (C.D. Cal. 2006) (finding delays of ninety-seven and
 6 seventy-one days unreasonable); see also Forristier v. Woodford, No.
 7 1:05-CV-00170, 2007 WL 809991, at *3 (E.D. Cal. Mar. 15, 2007)
 8 (finding delay of eighty-eight days unreasonable); Jackson v.
 9 Ollison, No. 06CV1123, 2007 WL 433188 at *5 (S.D. Cal. Jan. 23,
 10 2007) (holding an eight month delay unreasonable).

11 Assuming that Brazil's state petition was "pending" and
 12 therefore tolled for over four years from November 28, 2001,
 13 through May 24, 2006, his federal Petition was still filed after
 14 the one-year statute of limitations had lapsed. By the time
 15 Petitioner filed his first state habeas corpus petition, 309 days
 16 of AEDPA's one-year period had already run. (See Pet'r's Mem. P. &
 17 A. Ex. A.; Lodgment 2, In re Brazil, No. HC16533, Order 2.)
 18 Additionally, 232 days passed after Brazil's California Supreme
 19 Court habeas corpus petition was denied on May 24, 2006, and before
 20 he filed his first federal habeas corpus Petition in this Court on
 21 January 11, 2007. (Pet. 1.) These two delays total 541 days,
 22 which is 175 days beyond the one-year limitation established by
 23 AEDPA. 28 U.S.C. § 2244(d). Hence, unless Brazil is entitled to
 24 equitable tolling for 175 days, his federal habeas corpus petition
 25 must be denied as untimely.

26 **2. Equitable Tolling**

27 Equitable tolling of the statute of limitations is appropriate
 28 when "'extraordinary circumstances beyond a prisoner's control make

1 it impossible'" for the petitioner to file a timely petition.
 2 Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003) (quoting
 3 Brambles v. Duncan, 330 F.3d 1197, 1202 (9th Cir. 2003)); Stillman
 4 v. LaMarque, 319 F.3d 1199, 1202 (9th Cir. 2003); Miles v. Prunty,
 5 187 F.3d 1104, 1107 (9th Cir. 1999) (citations omitted). "[A]
 6 litigant seeking equitable tolling bears the burden of establishing
 7 two elements: (1) that he has been pursuing his rights diligently,
 8 and (2) that some extraordinary circumstances stood in his way."
 9 Pace, 544 U.S. at 418 (citations omitted). "[T]he threshold
 10 necessary to trigger equitable tolling (under AEDPA) is very high,
 11 lest the exceptions swallow the rule." Miranda v. Castro, 292 F.3d
 12 1063, 1066 (9th Cir. 2002). Further, Petitioner carries the burden
 13 of proving that the statute of limitations should be equitably
 14 tolled. Espinoza-Matthews v. California, 432 F.3d 1021, 1026 (9th
 15 Cir. 2005).

16 Brazil asserts two reasons to justify his untimeliness and
 17 argues they warrant equitable tolling. First, the San Diego
 18 Superior Court failed to provide him with requested transcripts
 19 and, second, he relied on the California Supreme Court Clerk's
 20 December 31, 2001, letter stating, "There is no time limit . . . in
 21 which you may file an original Petition for Writ of Habeas Corpus
 22 with the Supreme Court." (Pet'r's Opp'n Mem. P. & A. 5, Ex. C.)

23 **a. Inability to Obtain Court Transcripts**

24 Without any specificity, Petitioner asserts that he was
 25 "begging" the superior court to provide him with transcripts of a
 26 pretrial hearing "for years." (Id. at 5.) According to Brazil,
 27 his inability to obtain these documents justifies his delay. (Id.)
 28 In order for the missing documents to equitably toll the statute of

1 limitations, Brazil must show that his inability to obtain the
 2 documents constituted an extraordinary circumstance beyond his
 3 control that prevented him from timely filing his Petition and that
 4 he made diligent efforts to obtain the documents. See Pace, 544
 5 U.S. at 418; Roy v. Lampert, 465 F.3d 964, 969 (9th Cir. 2006)
 6 (citations omitted) (stating the "extraordinary circumstances" must
 7 be beyond the petitioner's control).

8 According to Petitioner, he has been told since 1999 that his
 9 file is on an "outboard" and therefore he has been unable to
 10 receive the transcripts. (Pet'r's Opp'n Mem. P. & A. 5.) Brazil
 11 asserts that he has requested the documents but has not received
 12 them. (Id.) It appears that his inability to obtain the documents
 13 was beyond his control. But there is no basis for concluding that
 14 the pretrial hearing referred to by Brazil is even relevant to the
 15 claims raised here. Petitioner's claims all relate to events
 16 occurring during trial or later. (Pet. 6-14.) Brazil has not
 17 shown that a transcript of a pretrial hearing has any bearing on
 18 the nine claims he raises in his Petition. Trial transcripts,
 19 which may be relevant to Brazil's claims, were always available to
 20 him.²

21 Brazil has not sufficiently demonstrated that it was
 22 impossible to file his federal Petition without the pretrial
 23 transcripts, that they are relevant, or that he acted with
 24

25 ² Additionally, Brazil submitted two letters received from his
 26 appellate counsel, Michael Earl, discussing trial transcripts.
 27 (Am. Pet. Exs. E, F.) The first letter, dated June 16, 1999,
 28 stated, "the transcript of your trial is being copied and will be
 sent to my office shortly." (Am. Pet. Ex. E.) The second letter,
 dated November 9, 2000, reiterated that the trial transcripts were
 at Earl's office and could be picked up by anyone Brazil
 designated. (Am. Pet. Ex. F.)

1 diligence in attempting to obtain them. The habeas petition was
 2 filed although Brazil had not yet secured these documents. (See
 3 Pet'r's Opp'n Mem. P. & A. 5.) Brazil also filed habeas corpus
 4 petitions in the San Diego Superior Court, the California Court of
 5 Appeal, and the California Supreme Court, all without the
 6 transcripts. (See Lodgment 2, In re Brazil Case No. HC16533 Order;
 7 Lodgment 3, In re Brazil No. D038775, slip op.; Lodgment 5, In re
 8 Brazil No. S134859, Order)

9 In United States v. Battles, 362 F.3d 1195, 1197 (9th Cir.
 10 2004), the Ninth Circuit noted that it would be difficult for a
 11 petitioner to assert it was impossible to file a habeas petition
 12 without trial transcripts when the petition was filed without them.
 13 Battles alleged that his attorney was "improperly withholding"
 14 trial transcripts and "refusing to cooperate." Id. at 1196.
 15 Relying on Ford v. Hubbard, 330 F.3d 1086, 1106-07 (9th Cir. 2003),
 16 overruled on other grounds by Pliler v. Ford, 542 U.S. 225 (2004),
 17 the appellate court remanded the case for the district court to
 18 further develop the evidentiary record regarding whether the
 19 petitioner's attorney's "behavior was sufficient to cause delays in
 20 the filing of the petition and, thus, entitled Battles to equitable
 21 tolling, if, indeed, that kind of behavior ever can"
 22 Battles, 362 F.3d at 1197-98.

23 As explained by the Eighth Circuit Court of Appeals:

24 [W]e understand petitioner's desire to have a
 25 transcript before filing for post-conviction
 26 relief. Possession of a transcript, however, is
 27 not a condition precedent to the filing of such
 28 proceedings. A petition seeking collateral
 relief could have been filed, following which, if
 necessary for decisions of the issue raised, the
 court could have ordered production of the
 transcript.

1 Gassler v. Bruton, 255 F.3d 492, 495 (8th Cir. 2001); See also Joe
 2 v. Mitchell, No. CV F 06-00739, 2007 U.S. Dist. Lexis 35408 at *15-
 3 16 (E.D. Cal. May 15, 2007) (quoting Gassler). Brazil does not
 4 have a constitutional right to transcripts for purposes of
 5 preparing his habeas corpus petition; transcripts need only be
 6 provided once a court finds they are necessary to determine the
 7 issue. United States v. Van Poyck, 980 F. Supp 1108, 1111 n.2
 8 (C.D. Cal. 1997) (citing United States v. Lewis, 605 F.2d 379 (8th
 9 Cir. 1979)). Petitioner has failed to establish that the lack of
 10 pretrial transcripts was the cause of his untimeliness. See Allen
 11 v. Lewis, 255 F.3d 798, 800 (9th Cir. 2001); Valverde v. Stinson,
 12 224 F.3d 129, 134 (2d Cir. 2000).

13 Presumably, Brazil was present at the hearing for which the
 14 transcripts were requested, and he is fully capable of presenting
 15 his recollection of the events on that date. See Battles, 362 F.3d
 16 at 1198 (stating that due diligence requires petitioner to "consult
 17 his own memory of the trial proceedings"). Indeed, the Amended
 18 Petition contains a detailed statement of his claims. (Am. Pet. 6-
 19 14.)

20 Petitioner also has not presented the Court with evidence that
 21 he acted diligently to obtain these documents. Brazil's assertion
 22 that he had been "begging" for the transcripts "for years" is
 23 insufficient to establish diligence. (Pet'r's Opp'n Mem. P. & A.
 24 5.) Petitioner has not presented any evidence of steps he took to
 25 obtain the transcripts. He did submit a record of his "outgoing
 26 confidential and legal mail" between August 21, 2002, and June 7,
 27 2004. (Am. Pet. Ex. C.) Without further information, however, the
 28 Court cannot determine what mailings show diligence in further

1 pursuit of this claim. Because it is Petitioner's burden to
 2 present sufficient evidence, the inability to obtain pretrial
 3 transcripts is not a basis for equitable tolling.

4 **b. Statement of California Supreme Court Clerk**

5 Brazil's second argument for equitable tolling is that a
 6 letter he received from the Clerk of the California Supreme Court
 7 led him to believe he could continue to attempt to obtain the
 8 pretrial transcripts without concern for a habeas filing deadline.
 9 (Pet'r's Opp'n Mem. P. & A. 5.) The letter states, "There is no
 10 time limit, however, in which you may file an original Petition for
 11 Writ of Habeas Corpus with the Supreme Court." (Pet'r's Opp'n Mem.
 12 P. & A. Ex. C.) It appears that Brazil was unaware of the separate
 13 statute of limitations in AEDPA for federal habeas petitions. But,
 14 "a pro se petitioner's lack of legal sophistication is not, by
 15 itself, an extraordinary circumstance warranting equitable
 16 tolling." Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir.
 17 2006).

18 Nevertheless, Brazil contends he is entitled to equitable
 19 tolling because he was misled by the state court with regard to any
 20 applicable time limit. For this statement to constitute an
 21 extraordinary circumstance that supports equitable tolling, it must
 22 have been "actively" or "affirmatively" misleading. Brambles v.
 23 Duncan, 412 F.3d 1066, 1068, 1070 (9th Cir. 2002). In Brambles,
 24 the court held that the petitioner was not affirmatively misled
 25 when the district judge told him that he could either dismiss
 26 unexhausted claims or dismiss his entire petition without prejudice
 27 and file a new petition after exhausting his state court remedies.
 28 Id. at 1067. The court also warned Brambles that 28 U.S.C. § 2244,

1 "limited the time within which a petition may be filed[,]" but at
 2 the time of the court's order, the federal statute of limitations
 3 had already run. *Id.* On appeal, the Ninth Circuit found that the
 4 court's instructions "were not affirmatively misleading. They
 5 presented accurate options available to Brambles." *Id.* at 1070.
 6 Although the district judge had failed to advise the petitioner of
 7 the likely consequences of dismissing his petition, he had not been
 8 affirmatively misled. *Id.*

9 In Brazil's case, the statement of the Deputy Clerk of the
 10 California Supreme Court cannot be considered affirmatively
 11 misleading; it was an accurate response to Petitioner's concerns
 12 about filing a timely petition with the California Supreme Court.
 13 See Cal. Const. Art. 6 § 10 (giving the California Supreme Court
 14 original jurisdiction over a habeas corpus claim); Cal. Penal Code
 15 § 1502 (West 2007) (stating that a writ of habeas corpus may be
 16 issued and served at any time); Carey, 536 U.S. at 221-23
 17 (discussing California's "indeterminate" timeliness rule which is
 18 based on "reasonableness" rather than precise time limits).
 19 Because the letter from the deputy clerk contained an accurate
 20 statement of California law, it cannot be considered affirmatively
 21 misleading. Likewise, it does not entitle Brazil to equitable
 22 tolling.

23 3. **Waiver of Untimeliness**

24 Brazil further asserts that the state has waived its right to
 25 move to dismiss his Amended Petition as untimely. (Pet'r's Opp'n
 26 Mem. P. & A. 6.) For this assertion Petitioner cites a district
 27 court case from the northern district of Illinois holding that the
 28 state must raise a § 2244(d) claim or it is considered to have

1 waived it. United States ex rel. Galvan v. Gilmore, 977 F. Supp.
2 1019, 1026 (N.D. Ill. 1998). This argument, however, is unavailing
3 because Respondent promptly filed its motion to dismiss alleging
4 untimeliness on May 17, 2007, (see Resp't's Mot. to Dismiss 1),
5 twelve days prior to the deadline for filing a motion to dismiss.
6 (Order Reopening Case and Setting Briefing Schedule 2.) It appears
7 Petitioner believes that the government should have made this
8 assertion in the state courts. (Pet'r's Opp'n Mem. P. & A. 6.)
9 Since § 2244(d) is a federal statute that only applies to federal
10 petitions, an argument based on AEDPA could not have been raised at
11 an earlier time with regards to a state court petition. Respondent
12 has not waived its untimeliness argument.

V. CONCLUSION

14 For the reasons set forth above, Respondent's Motion to
15 Dismiss the Petition for Writ of Habeas Corpus should be **GRANTED**.

This Report and Recommendation will be submitted to the United States District Court judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Any party may file written objections with the Court and serve a copy on all parties on or before December 28, 2007. The document should be captioned "Objections to Report and Recommendation." Any reply to the objections shall be served and filed on or before January 15, 2008. The parties are advised that failure to file objections within the

1 specified time may waive the right to appeal the district court's
2 order. Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991).

3

4 Dated: November 29, 2007

5

6 cc: Judge Lorenz
7 All parties of record

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28


RUBEN B. BROOKS
United States Magistrate Judge